FILED
FEB 28 1956
HAROLD B. WILLEY, Clerk

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1955

No. 596 MISC.

[redacted],

Petitioner,

- against -

[redacted] CO. INC. and BETHLEHEM STEEL CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO [redacted] COURT OF THE STATE OF NEW YORK [redacted] COUNTY OF [redacted] AND THE [redacted] COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1955

NO.

HAYES SALMOND,

Petitioner,

- against -

ISBRANDTSEN CO. INC. and BETHLEHEM STEEL CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK IN AND FOR THE COUNTY OF KINGS AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

Petitioner, Hayes Salmond, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York for the County of Kings entered on the 22nd day of May, 1953 and the judgment of affirmance ofthe Appellate Division of the Supreme Court

of the State of New York for the Second Judicial Department entered on October 3rd, 1955.

CITATION TO OPINION BELOW

The memorandum opinion of the trial Court Justice is unreported and is annexed hereto in appendix B, hereto at page B-1. The opinion of the Appellate Division of the New York Supreme Court is reported at 1 A.D.2d 578 and is at p. B-9 of appendix B. The Court of Appeals of the State of New York in denying petitioner's application for leave to appeal to that Court did not render an opinion.

JURISDICTION

The judgment of the Appellate Division of the Supreme Court of the State of New York was entered on October 3rd, 1955. A motion for leave to appeal to the Court of Appeals of the State of New York was timely made and the order denying such motion was entered on December 1st, 1955.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

HOW FEDERAL QUESTION IS PRESENTED

This is an action to recover damages for a maritime tort under the federal maritime law concepts of unseaworthiness and negligence.

The pleadings alleged a cause of action for maritime negligence and breach of the shipowner's warranty of unseaworthiness of the vessel.

The Trial Court in its opinion does not even discuss the cause of action for unseaworthiness and seemingly disregards the maritime concept of comparative fault when in its opinion it is stated:

> "This Court may not apportion the plaintiff's fault."

The Appellate Division in its opinion stated in part:

> "In our opinion, this case is not governed by maritime law because plaintiff's injuries were not 'caused by a vessel' 46 U.S.C.A. 740."

The record of this case is in the County Clerk's office of the Supreme Court of the State of New York for the County of Kings.

Trial was in the Supreme Court and the Appeal was taken to the Appellate Division. The Court of Appeals of the State of New York declined to exercise its discretionary power to review this case.

QUESTIONS PRESENTED

Whether the maritime law applies to this suit, and if so whether the courts below did not commit error in making a finding of no unseaworthiness or maritime negligence.

STATUTE INVOLVED

The statutory provision involved is Act of June 19, 1948, C.526 62 Stat. 496, Section 740 of Title 46 of the United States Code which comprises Appendix A, hereof, infra, pp.

STATEMENT

Plaintiff, a longshoreman was employed by American Stevedores Corp., not a party, to work upon the SS Flying Cloud, a vessel owned by the defendant, Isbrandtsen CO. Inc. Isbrandtsen had a contract with the defendant, Bethlehem Steel Co. for it to perform certain work aboard the ship, including the removal of concrete ballast from the hold. Bethlehem Steel Co. subcontracted

this work to plaintiff's employer.

On April 19, 1951, the plaintiff was on a truck which was on the pier alongside the vessel assisting in the removal of concrete ballast from the hold of the vessel. A piece of the concrete ballast being removed fell from the sling which was attached to the ship's winch and struck plaintiff, causing him to sustain severe personal injuries. A single cable was used to secure the ballast being unloaded. This could not prevent concrete pieces from falling on persons below. David J. Bunger, a ship supervisor for defendant, Bethlehem, described the safe method of using buckets to remove the concrete, which would prevent pieces from falling.

The trial court, without discussing unseaworthiness made a finding of no negligence, which was affirmed on appeal by the Appellate Division.

The Appellate Court in disregard of the facts in the record made a finding also of no unseaworthiness, though it prefaces its opinion with a determination that the federal maritime law does not apply.

REASON FOR GRANTING THE WRIT.

1. The Trial Court and the Appellate Division deny that the federal maritime law applies to this

case, which squarely falls within the purview of 46 U.S.C.A. 740.

Section 740 of Title 46, U.S.C.A. extends the admiralty and maritime jurisdiction to a case of damage

> "caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

In the instant case, the petitioner was injured by ballast being removed from the ship when it fell from the sling attached to the ship's winch.

A determination by this Court of the scope of Section 740 of Title 46 of the United States Code is of importance in determining the extent to which the federal maritime law may apply to the exclusion of contrary state interference by either legislation or judicial decision.

The words "caused by a vessel" must be taken to mean (parts) of a vessel.

The doctrine of seaworthiness derives, as this Court stated in MAHNICH V. SOUTHERN S.S. CO., 321 U.S. 96, at 99

"from the seaman's privilege to abandon a ship improperly fitted out."

In this case, the S.S. Flying Cloud was

"improperly fitted out"

by reason of the failure of the shipowner to supply buckets to remove the pieces of concrete ballast, the use of slings being the use of equipment not fit for the purpose intended.

An employee of defendant Bethlehem Steel Co., a ship supervisor, in fact testified that buckets should be used (Record Folio 198).

Where improper equipment is supplied, or proper equipment is not supplied the ship is as unseaworthy as if defective eqhipment were supplied, as was the situation in MAHNICH V. SOUTHERN S.S. CO. 321 U.S. 96.

The Appellate Division relieved the shipowner of liability because, as it says

"Plaintiff's employer was in sole control of the details of the work. . ."

In PETTERSON V. ALASKA S.S. CO. 347 U.S. 396 however, the relinquishment of control doctrine was determined to be an invalid defense, though one which the

New York Courts in this case applied to plaintiff's detriment.

The determination of the New York Appellate Court indicates a manifest intent to disregard the extension of the application of the admiralty and maritime law when they deny that 46 U.S.C.A. 740 does not apply to the factual situation herein presented.

It is obvious that in denying that the federal maritime law applies the state courts below have not given a full consideration to the concepts of the general maritime law as enunciated by the Federal Courts.

The Court in GARRET V. MOORE McCORMACK, 317 U.S. 238 (1942) granted a petition of certiorari to the Pennsylvania Court, where, as here there was doubt as to whether the state court had proceeded in such a manner that the substantial rights of the petitioner under the federal law were not being recognized.

2. The decision of the court below is believed to be erroneous because of the denial of the application of the federal maritime law to the factual situation presented, and as well for the rejection of the doctrine of ALASKA S.S. COMPANY, INC. V. PETTERSON, 347 U.S. 396, rehearing denied 347 U.S. 994, affirming 205 F. (2d) 478, wherein it was determined that a shipowner is responsible

for the unseaworthiness of the vessel even where control has been relinquished.

3. Error, was further committed by the courts below in finding, against the proven facts, that the contractor, BETHLEHEM STEEL CO., was not guilty of maritime negligence.

The State of New York by its Workmen's Compensation Law, Section 3 (group 12), recognizes longshoremen as being engaged in "hazardous employments.".

There can be little doubt that the particular operation involved in the instant case was extremely hazardous.

Bethlehem's own employee, a safety engineer at the yard at the time the vessel was being serviced testified that he observed the manner of the removal of the ballast and that it was proceeding in an unsafe manner (197-200).

The defendant, Bethlehem though charged, as was the shipowner, with the responsibility of having the work proceed in a safe and proper manner, failed to stop the work or see that it proceeded in a safe manner (201, 202).

The yard superintendent was advised (202), and though he was in a position of authority he did

not take any preventive measures (212).

In the examination before trial of D. J. Bunger, read at the trial there is the following question as to the power of the yard superintendent and the answer thereto which conclusively indicates that Bethlehem retained control of American Stevedores, its subcontractor, as far as safety measures were concerned.

> "96. Q. How about independent contractors? A. Well, I think he could stop them if he wanted to.
>
> 97. Q. He could? A. Yes."

Since the examination has been closed, these words were added: "If he thought the work was endangering the ship or our employees."

It was only after the examination was closed that the defendants inserted the following self-serving declaration:

> "If he thought the work was endangering the ship or our employees."

A contractor cannot relieve itself of liability by delegating the work to an independent contractor where the work is inherently dangerous.

In BESNER V. CENTRAL TRUST CO. 230 N.Y. 357 (1921), at 360, the Court of Appeals stated

that a contractor would be liable

> "where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed or is intrinsically dangerous."

In the instant case the work was not in fact carefully performed, it was inherently dangerous, and the hazardous nature of the work has in fact been recognized by the New York legislature. Such was the testimony of D. J. Bunger, Bethlehem's own employee.

Inasmuch as Bethlehem retained control of the operation it is responsible for its negligence in permitting the work to proceed as it did.

4. Though factual issues are involved, where the record indicates that an unseaworthy condition exists review should be had, as was the case in MAHNICH V. SOUTHERN STEAMSHIP CO. 321 U.S. 96 (1943) where certiorari was granted to review a United States Court of Appeals affirmance of a District Court judgment which denied recovery in a case such as this.

The question of the liability of a general contractor to an employee of a subcontractor injured in the course of his maritime employment should be resolved by this Court.

In non-maritime cases a general contractor is responsible, at least in New York, under the doctrine of BESNER V. CENTRAL TRUST CO. 230 N.Y. 357 (1921)

> "where the thing contracted to be done is necessarily attended with danger, however, skillfully and carefully performed or is intrinsically dangerous."

the contractor is responsible.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted

GILBERT ROSENTHAL
Counsel for Petitioner

STATUTE INVOLVED

Section 740: EXTENSION OF ADMIRALTY AND MARITIME JURISDICTION; LIBEL IN REM OR IN PERSONAM; EXCLUSIVE REMEDY; WAITING PERIOD

The Admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice in obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided, further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claims has been presented in writing to the Federal Agency owning or operating the vessel causing the injury or damage.

ORAL DECISION BY OFFICIAL REPORTER

In this case the plaintiff, Hayes Talsons was a stevedore employed by American Stevedores, Inc., which had a contract with the defendant, Bethlehem Steel Company for the removal of concrete ballast in the hold of the steamship "FLYING CLOUD" which was owned by the defendant Isbrandtsen Co., Inc.

Briefly stated, this concrete had, at some time long prior to the happening of the accident, been poured into hatch No. 3 where, with the passage of time, it had solidified and was used as ballast.

When the ship was sent to the shipyard of the defendant, Bethlehem it was for the purpose of repairs and as indicated, among other things, for the removal of this concrete which it was necessary to break up so that it could be taken out of the hold, placed on trucks on the dock, and carried away for disposal.

It was this work that was subcontracted to plaintiff's employer, American Stevedores, Inc. It was prosecuted by the American Stevedores' men breaking up the concrete in the hold, then lashing it with wire cable, whereupon the signal would be given to another American Stevedore employee on the dock, and he, in turn, would signal to his co-workers who were operating the winches.

When the large concrete pieces were raised out of the hold and then swung toward the waiting truck, they would be lowered so that the cable around them could be loosened.

On the day of the accident, plaintiff had been in the hold and then was called out or ordered out by his foreman, Tony Corio, and he replaced another man who had been on the truck.

I am mindful that there is evidence that earlier inthe day another workman had been injured, but in quite a different manner. The earlier man was injured while on the truck, and when the concrete came down, by being pinched against the side. This proof I admitted on the theory that the earlier accident might be some evidence of notice of a defect, if one had been proven.

Whatever natural sympathy the co-workmen of the plaintiff have for him, which sympathy the Court shares, nevertheless there is not sufficient believable evidence to warrant a finding that either the owners of the vessel or the general contractor were at any fault. In fact, one or two of the plaintiff's fellow-workmen, called as witnesses for plaintiff, testified that plaintiff and another workman had been on the cab of the truck where they were in positions of safety; that one of them had left before the load which caused the accident came up and had placed himself on the shed of the shack which was at the tail end of the truck.

- 2 -

While the load was on the way up the plaintiff, according to one witness, left the cab and climbed over the large pieces of concrete in the truck, and this witness said that he held up the palms of both hands, indicating to the winchman to halt, but that before it came to a stop, and while the concrete was in the air, a large piece fell off and struck the plaintiff.

A defense witness, who was plaintiff's co-worker and employed by American Stevedores, testified that when this piece was ready to be hoisted he called the foreman's Tony Corio's attention to a crack in the concrete, but that the foreman gave orders to proceed.

The winches on ships, whether hauling in an anchor or lifting concrete blocks, do not operate with the smoothness of a hydromatic automobile. It is not enough, to fix liability, to say that there was a jerk or jerking in the cable. There necessarily would be some slight movement or jerking when the lifting began and the concrete blocks settled in the slings. Nor is there any evidence that the work was prosecuted negligently. There is evidence from some of the witnesses that on other work where they had been the hoisting was done by slings rather than by buckets. That would necessarily be so if the thing being hauled was in somewhat smaller size than these very large pieces of concrete.

The negligence, if there was any, was the negligence of American Stevedores' foreman, Tony Caserio, who gave what might be regarded as an assurance of safety to the men under him when he ordered the work to proceed, though his attention had been called to the crack in this mass of concrete. There is no suggestion of a breaking of the cable line nor of any defect in the winches.

In the case of MURPHY V. AUTOPURCHASE AMUSEMENT CO., 250 N.Y. 479, in one of the magisterial opinions of Chief Judge Cardozo, he used language which is here applicable. The Murphy case is sometimes referred to as "The Flopper" case. The defendant had an amusement place down at Coney Island. This amusement attraction at the defendant's place of business had a moving belt on which passengers sat or stood. Many of them were unable to keep their feet because of the movement of the belt. In reversing a judgment of the Appellate Division and the Trial Term, Chief Judge Cardozo said:

> "We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him with a jerk."

Nor can it here be said that the load on the electric supply line was too heavy. There is no evidence from which such an inference can be drawn. If anything, the

the believable evidence is to the contrary, for it has been testified that when the Bethlehem Steel Company's men were ready to transfer steel plates from the dock to the ship, to transfer steel plates from the dock to the ship, and for that purpose used one of the winches, that then the work of hoisting the concrete by the American Stevedores was stopped, so that only one piece of the work was proceeding at a time.

The contract between Bethlehem Steel Company, the general contractor, and American Stevedores, the sub-contractor, contained this, on the first page of plaintiff's Exhibit 2:

> "Item I
>
> "Drill, break, remove and dispose approx 58; tons cement ballast #3 hold."

In the form attached there is this provision:

> "FIRST. WORK CONTRACTED FOR:
> The Contractor agrees to perform all the work (including the furnishings of all materials, tools, equipment, labor and superintendence required therefor) shown or indicated on the plans and specifications designated as follows:"

and then follows the typewritten designation.

Further, in paragraph "SEVENTH" of these conditions and specifications, this appears, under the title "Responsibility and Insurance":

> "The Contractor shall be solely responsible for the safety of the Work and of all equipment and materials to used therein until final completion of the same and shall promptly at its own expense repair any damage to the same, however caused. The contractor shall properly guard the Work to prevent any person or persons being injured by it or by the condition of the site and shall in all respects comply with any and all provisions of the law or of local ordinances relating to the maintenance of danger signals, barriers, lights, etc., in and about all excavations or other parts of the Work where the same are required."

However, unfortunate the injury to this plaintiff is, under the rules of law long established I can find no basis for recovery against these two defendants.

When a precise cause may be as well attributed to a condition for which no liability attaches as to one where it does, there can be no recovery. (RUBACK V. McCLEARY 220 N.Y. 188; WHITE V. LEHIGH VALLEY R. R. Co. 220 N.Y. 131.)

In all actions for negligence, the trier of the fact must be able to place his finger and say, "There is negligence." It may not be left to speculation or remote possibility.

"Negligence is to be gauged by the ability of one to anticipate danger. The test of actionable negligence is not what could have been done to have prevented a particular accident but what a reasonably prudent and careful person would have done under the circumstances in the discharge of his duty to the injured part. Failure to guard against a remote possibility of accident, or one which could not, in the exercise of ordinary care, beforeseen, does not constitute negligence." (LANE V. CITY OF BUFFALO, 232 App. Div. 334, at 338; cited with approval in POREMBSKE V. COHN, 234 App. Div. 543, at 546)

In BRODERICK V. CAMPBELL, 301 N.Y. 182, the Court said, at page 187:

> "At common law, a general contractor is not responsible for the independent negligent act of his subcontractor (FRENCH V. VIX, 143 N.Y. 90; HEXAMER V. WEBB, 101 N.Y. 377), and it is true that the mere retention of the power of general supervision to see that the over-all work proceeds properly and to co-ordinate the actions of several subcontractors on the site will not ordinarily cast him in damages for the negligence of any of the latter (MOORE V. CHARLES T. WILLIS, INC., 250 N.Y. 26; ARGO V. HARLEM CONTR. CO., 265 N.Y. 5[illegible]). Nor is the general contractor obliged to protect employees of his subcontractors against the negligence of his employer or that of a fellow servant (JACOBO V. FRANK & FRANK CONTR. CO., 259 N.Y. 377)."

This Court may not apportion the plaintiff's fault. In the interest of his own safety, familiar as he was with this type of work, he should either have remained on the cab of the truck where he was, or, like his fellow workmen, he should have gone to the roof of the shed before the fatal load was hoisted. He knew or should have known of the danger which existed. He was guilty, to some degree, of contributory negligence.

On all of the grounds stated, there must be judgment for the defendants dismissing the complaint on the merits.

[illegible]

[illegible], Appellant, Vs [illegible] COMPANY, INC. and BETHLEHEM STEEL CO., Respondents.

Supreme Court, Appellate Division, Second Department

[illegible], 1955.

Before NOLAN, P.J., and MacCRATE, SCHMIDT, BELDOCK and UGHETTA, JJ.

MEMORANDUM BY THE COURT

Defendant, Tsakiroglou Company, Inc., was the owner of a ship which was docked in the shipyard of defendant, Bethlehem Steel Co., for general repairs and for the removal of concrete ballast from one of the holds. Bethlehem subcontracted with plaintiff's employer, American Stevedores, Inc., to remove the concrete. While a block of the concrete ballast was being removed from the hold to a truck on the dock, a piece of the concrete broke off the block while it was suspended in mid-air and struck plaintiff, who was working on the truck. In this action to recover damages for personal injuries, the official referee to hear and determine found as a fact that the concrete block involved in the accident was cracked while it was

still in the hold; that this fact was brought to the attention of plaintiff's superiors, who nevertheless directed that the work proceed. The details of the work were under the complete supervision of American and plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision.

Judgment in favor of defendants unanimously affirmed, with costs.

In our opinion, this case is not governed by maritime law because plaintiff's injuries were not "caused by a vessel". 46 U.S.C.A. S.740. The evidence showed, and the official referee found, that the accident was caused by the breaking of a concrete block being transferred from the hold of the ship to the truck on the dock after plaintiff's superiors were notified that there was a crack in it and, despite that notification, the work was ordered to go forward.

However, even assuming that the case is governed by maritime law, there is no proof of unseaworthiness. There is no proof either that the vessel, or its equipment, or any of its appliances was defective, or that the equipment used was not reasonably fit for the use for which it was intended.

Plaintiff's employer was in sole control of the details of the work, and plaintiff's injuries resulted solely from the manner in which the work was done under his employer's supervision. Under the circumstances, there is no liability either on Tebrammtsen, Berti Vs. Compagnie De Navigation Cyprien Fabre, 2 Circ., 213 F 2d 397, or on Bethlehem. Broderick Vs. Caldwell-Wingate Co., 301 N.Y. 182, 93 N.E. 2d 629.

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HAYES SALMOND,

Petitioner,

against

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Respondents.

BRIEF OF RESPONDENT, ISBRANDTSEN CO., INC., IN OPPOSITION TO PETITION OF HAYES SALMOND FOR WRIT OF CERTIORARI.

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New York 5, N. Y.

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Supreme Court of the United States

OCTOBER TERM 1955.

HAYES SALMOND,
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ISBRANDTSEN CO., INC. and
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Respondents.

No. 596 Misc.

BRIEF OF RESPONDENT, ISBRANDTSEN CO., INC. IN OPPOSITION TO PETITION OF HAYES SALMOND FOR WRIT OF CERTIORARI.

STATEMENT.

Plaintiff *, a shore worker appealed from a judgment of the Supreme Court (11-15)** Kings County, dismissing his complaint after a trial before Honorable Meyer Steinbrink, Official Referee. Honorable Meyer Steinbrink found as a fact (1) that there was not sufficient believable evidence to warrant a finding that either the owner of the vessel or the general contractor were at fault (495); (2) that there was no evidence that the work was prosecuted negligently by the defendants; (498) (3) that there was no evidence whatever to support even a suggestion of the breaking of the cable, or of any defect in the winches or that it was improper to remove the larger blocks of con-

* The parties are referred to as they were in the courts' opinions below.

** References are to folios of the record on appeal.

crete by the use of the cable sling rather than by buckets into which the larger blocks could not fit; (499, 301, 302) (4) that there was no evidence from which it could be said that the load on the electrical supply to the winches was too heavy, (502) and (5) that the negligence, if any, was the negligence of plaintiff's foreman, Corio, who gave what might be regarded as an assurance of safety to the men under him when he ordered the work to proceed, although the foreman's attention had been called to a crack in a block of concrete which was being removed from the ship to a truck upon which plaintiff was working. (499) Honorable Meyer Steinbrink stated that "this court may not apportion the plaintiff's fault", and found that plaintiff was guilty to some extent of contributory negligence. (510, 511)

The Appellate Division of the Supreme Court, Second Department, unanimously affirmed. Its decision is reported in 286 App. Div. 1015. It found that Sec. 740 of Title 46 U. S. Code did not apply because plaintiff's injuries were not "caused by a vessel", but that

> "• • • the accident was caused by the breaking of a concrete block being transferred from the hold of the ship to the truck on the dock after plaintiff's superiors were notified that there was a crack in it and, despite that notification, the work was ordered to go forward. However, even assuming that the case is governed by maritime law, there is no proof of unseaworthiness. There is no proof either that the vessel, or its equipment, or any of its appliances was defective, or that the equipment used was not reasonably fit for the use for which it was intended. Plaintiff's employer was in sole control of the details of the work, and plaintiff's injuries resulted solely from the manner in which the work was done under his employer's supervision. Under such circumstances, there is no liability either on Isbrandtsen

(*Berti* v. *Compagnie De Navigation Cyprien Fabre*, 213 F., 2d, 397) or on Bethlehem (*Broderick* v. *Cauldwell-Wingate Co.*, 301 N. Y., 182)."

Reasons for Denying the Writ.

No federal question is involved in this petition. Review is sought here of findings of fact only. These facts were found by the trial court and were supported by substantial evidence. The Appellate Division of the Supreme Court, Second Department, found no unseaworthiness nor negligence. The Court of Appeals on a motion addressed to it for leave to appeal read the papers and brief in support thereof, and denied the motion.

The decision and findings of the trial court and of the Appellate Division are not clearly erroneous and are supported by substantial credible evidence.

In presenting the question involved, plaintiff, at page 4 of his petition, states it to be:

> "Whether the maritime law applies to this suit, and if so whether the courts below did not commit error in making a finding of no unseaworthiness or maritime negligence."

He thereby recognizes that there is involved only the question of whether the findings that there was no unseaworthiness nor maritime negligence are supported by the evidence. This is not a ground for granting a writ of *certiorari*.

A review on a writ of *certiorari* is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Rules of the Supreme Court of the United States, 19, 1(a). Some of the considerations are where the state court has decided a federal question of substance not here-

tofore determined by the Supreme Court or where it has decided a federal question probably not in accord with the decisions of the Supreme Court. Neither situation prevails here. It has not misapplied federal law on either negligence or maritime unseaworthiness, nor has it decided a question not heretofore determined by this court. The only issue here is whether the findings of fact of the courts below are supported by the evidence.

The Facts.

Plaintiff, Hayes Salmond, was employed by the American Stevedores, Inc. (75) which had contracted with the defendant, Bethlehem Steel Company, to drill, break up and remove concrete ballast from the hold of the SS *Flying Cloud* (265) owned by defendant, Isbrandtsen Co., Inc.

The contract provided in part as follows (503, 504):

> "Item I—Drill, break, remove and dispose approx. 589 tons cement ballast #3 hold.
>
> First. Work Contracted For: The Contractor agrees to perform all the work (including the furnishings of all materials, tools, equipment, labor and superintendence required therefor) shown or indicated on the plans and specifications designed as follows:
>
> • • • • • •
>
> "Responsibility and Insurance"
>
> "The Contractor shall be solely responsible for the safety of the Work and of all equipment and materials to be used therein until final completion of the same and shall promptly at its own expense repair any damage to the same, however caused. The Contractor shall properly guard the Work to prevent any person or persons being injured by it or by the condition of the site and shall in all

respects comply with any and all provisions of the law or of local ordinances relating to the maintenance of danger signals, barriers, lights, etc., in and about all excavations or other parts of the Work where the same are required."

At the time of his accident, plaintiff was working on a truck on the pier, assisting in loading the concrete blocks which his fellow workers had removed from the hold of the ship. He had been working at that job for several hours at the time of his injury. (92, 99) The testimony established, and the judge found, that as a large block was being removed from the hold of the ship, one of the co-employees of the plaintiff, who was working in the hold of the ship, called the attention of the foreman, Corio, also employed by American Stevedores, to a crack in the concrete, but that the foreman, nevertheless, gave orders to proceed with the hoisting of the block. (424-429) As it was being lowered over the side of the ship onto the truck, plaintiff placed himself in a position on the truck immediately under the block instead of leaving the truck and going to the shed alongside it. A signal was given to the winchman to halt the load, but before it came to a stop and while still suspended in the air, a large piece fell off and struck the plaintiff, causing his injuries. (358, 359) There was some evidence that on other similar jobs where the concrete was broken up into smaller pieces, buckets were available and were used to remove the ballast rather than slings. (424, 436, 437) However, there was also substantial believable testimony, and the judge found as a fact, that it was proper to remove the larger blocks of concrete by the use of slings rather than by buckets into which the large blocks could not fit. (301, 302)

The plaintiff on this appeal builds his entire claim of unseaworthiness upon a misinterpretation of the testimony

of one Bunger, an employee of the Bethlehem Steel Company. The plaintiff pretends that there was evidence that the accident was caused by improper equipment because Bunger said that he did not like the way the work was going and that instead of using a cable as a sling, buckets should have been used. As a matter of fact, Bunger's testimony concerning the method of doing the work had no relation at all to the way this accident was caused. What Bunger was worrying about was the fact that after landing the large pieces of concrete in the truck with a cable used as a sling, the cable was then pulled out from under the concrete and in this way chafed. (199) He feared that the cable would later get weak and break. (199) No such eventuality occurred in this case and, indeed, the accident did not happen while the cable was being pulled out from under the concrete in the truck. Bunger's opinion that buckets should have been used related entirely to this fear of the slings becoming chafed.

The actual method used by the stevedores contemplated that the plaintiff would not be in the truck while the concrete was being lowered from above him. As the judge found in his opinion (folio 510): "In the interest of his own safety, familiar as he was with this type of work, he should either have remained on the cab of the truck where he was, or like his fellow workmen, he should have gone to the roof of the shed before the fatal load was hoisted. He knew or should have known of the danger which existed. He was guilty, to some degree of contributory negligence". The only other negligence to which the plaintiff contributed was the negligence of his employer, American Stevedoring Company. They should have seen that the concrete was completely broken and not merely cracked, before being lifted, and they should have given the slow moving Salmond more time to get off the truck onto the cab or the shed.

POINT I.

THE FINDINGS OF THE TRIAL COURT AND OF THE APPELLATE DIVISION THAT THE VESSEL AND ITS EQUIPMENT WERE REASONABLY SAFE AND FIT FOR THE USE INTENDED AND THAT THE VESSEL AND ITS EQUIPMENT WERE SEAWORTHY IS CLEARLY SUPPORTED BY THE BELIEVABLE EVIDENCE.

Plaintiff, in his brief, asserts that the maritime law applies because of Title 46 U. S. C. A., Sec. 740, which provides in part as follows:

> "The admiralty and maritime jurisdictions of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

However, an examination of the facts of this case demonstrates that the injuries alleged were not "caused by a vessel". The injury here was caused by plaintiff being struck with a piece of concrete which his foreman negligently permitted to be carried from the vessel in a cracked condition.

However, assuming that Section 740 applies, the finding of the official referee and of the Appellate Division that the ship and its equipment were not defective and, thus, were reasonably safe, is thoroughly supported by the evidence.

There was and could be no suggestion that the cable supporting the block of concrete broke or gave way in any respect. The accident was caused simply because of a crack in a block of concrete which was called to the attention of the foreman, Corio, who, nevertheless, ordered the work to proceed.

In his pleadings plaintiff alleged other grounds of negligence, in that defective ship's equipment was used but, because of lack of evidence, abandoned such claims at the trial and on appeal, and limits his claim of unseaworthiness to the use of a perfectly good wire sling instead of a bucket. The finding of the referee that the use of a sling instead of a bucket for large pieces of concrete, was proper, was supported by the evidence. (301, 302) That finding alone negatives any possible claim that the use of a sling instead of a bucket rendered the vessel unseaworthy.

Plaintiff cites several cases in Point II of his brief dealing with the question of unseaworthiness. All of these cases, however, deal with equipment *on the ship which was, in fact, defective or which did, in fact, break* due to an inherent latent defect, thus rendering the vessel unseaworthy. No such contention is or can be made in this case. No part of the ship's equipment broke; nor did any other equipment break.

In *Manhat* v. *United States*, 220 F. 2d 143, at 148 the court said:

> "In every case in which recovery for unseaworthiness has been allowed, the trial court or the appellate court, in the exercise of its special admiralty power, found that either the ship or its appliances or equipment was not thus fit."

No claim is made that the ballast in the hold of the ship was negligently stowed nor that the vessel was unseaworthy because it carried concrete ballast in its hold. The concrete had to be broken up in order to remove it.

As a detail of the work which his employer contracted to perform, one block of concrete was carried out, which contained a crack, with the knowledge of plaintiff's foreman, and which he, nevertheless, permitted to be hoisted off

the ship. It was this piece of cracked concrete which resulted in plaintiff's injury. Plaintiff does not urge and, indeed, he recognizes that he cannot urge, that the crack in the concrete rendered the vessel unseaworthy. The crack in the concrete was caused by a mere incident of the work. *Gallagher* v. *United States Lines Company*, 206 F. 2d 177, cert. den. 346 U. S. 897. *Manhat* v. *United States*, 220 F. 2d 143, cert. den. 349 U. S. 966.

In the *Manhat* case, the injured man sought to recover on the theory of negligence as well as on unseaworthiness. The court found that respondent was neither guilty of negligence nor was the vessel unseaworthy. In that case, libelant and other fellow employees of an independent contractor were performing work of cleaning and painting the vessel's lifeboats. The lifeboat in which the men were working had been removed from its secured position and was swung out by members of the ship's crew in order that the deck under the boat's cradle could be chipped and painted. The lifeboat was suspended from hooks and falls which the trial court found to be properly secured when the boat was entered by libelant and his fellow workers who were employees of an independent contractor. Suddenly, due to the negligence of one of the fellow workers in mishandling of the releasing gear, the boat fell. The court decided against the libelant's contention that the releasing gear was in an unseaworthy condition. It said at page 146:

> "• • • 'It need hardly be pointed out that before strict liability for unseaworthiness can attach, the ship or appliance in question must be shown to have been unseaworthy, *Grillo* vs. *United States*, 177 F. 2d 904 (2CA, 1949), and the very same matter which led the court to the conclusion reached with respect to the probable cause of the accident, lends substan-

tial support to its finding that the lifeboat and its equipment were in proper order, free from defect and in all respects seaworthy at the time libellant went aboard. The cases relied upon by appellant indicate, at most, that given the existence of an unseaworthy condition, it is immaterial that the defect was not discernible on diligent inspection, or that absent any more plausible explanation for the occurrence, it may be inferred that the vessel or the appliance in question was unseaworthy. As the apparatus was in proper working order and free from any defects by way of design or otherwise and the precipitation of the lifeboat to the pier was caused by the carelessness of one of the painters, the trial court was compelled to find as it did that the machinery was in all respects properly constructed and maintained and that nothing about the apparatus itself justified an inference of unseaworthiness; and none of the authorities cited holds anything to the contrary.'"

With respect to the claim that failure to lash the lifeboat constituted unseaworthiness, the court had the following to say at page 147:

> "We now turn to libellant's assertion that the failure to use these extra precautions constituted unseaworthiness. If he prevails in this contention, it is undeniable that it is unnecessary to inquire into whether the unseaworthy condition came about as a result of the fault or neglect of respondents. Alaska S.S. Co., Inc. *vs.* Petterson, 347 U. S. 396 (1954); Pope and Talbot, Inc. *vs.* Hawn, *supra;* Seas Shipping Co. *vs.* Sieracki, 328 U. S. 85 (1946). Although the doctrine of seaworthiness which is said to impose a warranty on the shipowner that the ship, its equipment and appliances are not defective has, in recent years, been extended to include within the scope of the warranty such things as appliances brought on board by an independent contractor to

be used by him in repairs aboard ship, Alaska S.S. Co., Inc. *vs.* Petterson, *supra,* and the adequacy and competency of its crew, Overseas Tankship Corp. *v.* Keen, 194 F. 2d 515 (2 CA 1952) certiorari denied, 343 U. S. 966, it has never been held to require the best possible equipment or to impose an insurer's liability for any and all injury to those working on shipboard, Berti *vs.* Compagnie De Navigation Cyprien Fabre, 213 F. 2d 397 (2 CA 1954); see Doucette *vs.* Vincent, 194 F. 2d 834 (1 CA 1952). As this Court held very recently, '[I]t requires only that equipment be reasonably fit for the use for which it was intended • • •.' Berti *vs.* Compagnie De Navigation Cyprien Fabre, *supra.* In every case in which recovery for unseaworthiness has been allowed, the trial court of the appellate court, in the exercise of its special admiralty power, found that either the ship or its appliances or equipment was not thus fit.

In the case before us, the testimony presented to the trial court clearly provided a predicate from which it could be and was quite reasonably inferred that a Rottmer-type releasing gear in proper condition furnished ample protection against the falling of a lifeboat and that the gear here in question was not defective or inadequate. The imposition of a requirement that a lifeboat be rigged to take care of exigencies as remote and unlikely as that which arose in this case would extend the scope of the warranty of seaworthiness far beyond the limits set by the criterion of reasonable fitness. Under these circumstances, the trial court's finding of seaworthiness seems to us to be unassailable."

The only evidence upon which plaintiff here could even remotely predicate a finding that the equipment furnished by his own employer was not suitable is the testimony of Mr. Bunger (199-200) that "they loaded the blocks in a

truck and put one end of the sling on the hook on the ship and just pulled the sling right out of the load which lets the load bounce around in the truck". He thought that "there was danger of breaking wires and getting cracked crowns, and if they weaken that way you could have a possible accident later on". (199-200) It is clear beyond a question of doubt that Mr. Bunger was concerned only with the method of getting the slings out from under the concrete after the blocks of concrete had actually been loaded into the truck. He feared this would chafe and weaken the wire. This testimony in no way is concerned with the adequacy of the sling to handle the blocks of concrete as they were removed from the vessel. The sole and only reason for this accident was the failure of plaintiff's foreman to break off the cracked piece of concrete from the block in question. There is not one word of evidence that the sling was inadequate to handle the blocks of concrete and, indeed, the court found as a fact on ample evidence that it was adequate. The testimony with respect to buckets was only in connection with smaller pieces of concrete which could not be handled by a sling.

The sling, itself, did not break nor did any *ship's* equipment break and the court's finding that all equipment was safe, including the winches, the supply of electricity, slings and tackle, is adequately supported by evidence. The decision of plaintiff's foreman to permit the block of concrete to be carried out of the vessel with an obvious crack in it, was a detail of the work for which the shipowner was not responsible. This did not constitute unseaworthiness.

In *Berti* v. *Cyprien Fabre*, 213 F. 2d 397, the court said at page 400:

> "* * *. But it has never been held that it (unseaworthiness) requires the best possible equipment,

> see *Doucette* v. *Vincent*, 194 F. 2d 834, * * *. It requires only that equipment be reasonably fit for the use for which it was intended, * * *."

On page 7 of petitioner's brief, it is stated that the SS. *Flying Cloud* was improperly fitted out because of the failure of the shipowner to supply buckets to remove the concrete ballast. This is a mis-statement of fact for buckets were available for use by the stevedores (436, 437). Moreover, there was substantial believable testimony and the trial court and the Appellate Division found as a fact that the use of a sling was proper for the large pieces of concrete which were being handled at the time of plaintiff's accident. Plaintiff's injury arose out of a mere detail of the work which did not render the ship unseaworthy nor make the shipowner negligent. The doctrine of unseaworthiness does not apply to a situation where a perfectly good usable wire cable was used instead of a bucket. *Manhat* v. *United States*, 220 F. 2d 143. The official referee and the Appellate Division found that the use of a sling was proper. It cannot be said that the findings of the official referee or the Appellate Division were erroneous.

POINT II.

THE REFEREE FOUND AS A FACT THAT NEITHER DEFENDANT WAS NEGLIGENT. HIS FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Both New York and Federal law deny recovery against an owner or general contractor for an accident due to a momentary act of negligence on the part of the sub-contractor in the details of the work. This is a different question from unseaworthiness or safe place to work, to which

the doctrine of non-delegability applies. On the contrary, it is negligence in a detail of the work, which no amount of foresight or equipment provided can prevent.

As to New York law:

An owner is not liable for accidents which happen in the course of work contracted to be performed by an independent contractor. *Uppington* v. *City of New York*, 165 N. Y. 222; *Moore* v. *Wills, Inc.*, 250 N. Y. 426; *Ahbol* v. *Harden Contracting Co.*, 265 N. Y. 564; *Iacono* v. *Frank and Frank Contracting Co.*, 259 N. Y. 377; *Kuhn* v. *City of New York*, 274 N. Y. 118; *Broderick* v. *Cauldwell*, 301 N. Y. 182.

There is not the slightest suggestion in this case that defendant, Isbrandtsen, in any way interfered with the performance of the work by American Stevedores. Moreover, it is clear beyond doubt that even though Isbrandtsen had retained the power of general supervision (of which there is not the slightest evidence), it would not be responsible to plaintiff for his injuries. Nor were defendants obliged to protect plaintiff against the negligence of American Stevedores or of plaintiff's fellow employees. *Broderick* v. *Cauldwell*, 301 N. Y. 182, 187.

Gallagher v. *United States Lines Co.*, 206 F. 2d 177, cert. den. 346 U. S. 897 is a complete answer to plaintiff's contention. The factual situation presented in *Gallagher* is almost identical with the situation here. There it was contended that the discharge of cargo was negligently performed in that the device used to discharge the cargo was improper.

At page 179 the Court said:

> "We do not think that by giving United a general power to approve the equipment to be used the intent of the parties to this contract was to reserve to United the detailed control that would make it liable for the injury to the plaintiff's decedent.

> United never exercised any control over the details of the work, which is some indication of what the parties to the contract intended."

The Supreme Court denied certiorari, 346 U. S. 897. This was long after the date of the decisions relied on here by the plaintiff such as *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85.

There is no evidence whatever that Isbrandtsen had any power to approve the equipment being used by American Stevedores. On the contrary, the contract under which American was working contained a provision which required it to furnish all superintendence required for the performance of the work, and also required it to be solely responsible for the safety of the work and the equipment used.

Even if it be assumed that federal maritime law controls, the result would be no different. *Berti* v. *Cyprien Fabre*, 213 F. 2d 397, demonstrates this fact. In the *Berti* case, the contract between the shipowner and the stevedore carried a provision, very similar to the contract involved here between American and Bethlehem, requiring the stevedore to provide "such other stevedoring supervision as are needed for the proper and efficient conduct of the work". At pages 399, 400 and 401 the Court said:

> "American relies heavily on the fact that two of Cyprien's (shipowner's) men were present at the hatch supervising distribution of the cargo and guarding against pilfering. But there is no evidence that they were in any other way concerned with the manner in which American performed its work. As we said in Gallagher *v.* United States Lines Co., 2 Cir., 206 F. 2d 177, 179, certiorari denied 346 U. S. 897, 74 S. Ct. 221, 'a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the

contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work.' American has continually asserted that there was an issue as to control of the operation, but we see virtually no evidence to support its contention. And had there been, the question would properly have been one for the jury. We are clear that since control of the details of the operation was left to American, Cyprien cannot be held for negligence in the latter's performance."

• • • • • •

"If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien."

• • • • • •

"As for the manner in which the work was performed, and any resulting transitory conditions, such as the partly covered hatch, which may have been unsafe, American's assumption of control relieved Cyprien of responsibility."

That decision was rendered long after the Supreme Court decisions relied on by the plaintiff. It is in no way inconsistent with them.

There is no merit to the contention made by plaintiff on page 3 of his brief, that the court incorrectly applied the federal maritime rule of contributory negligence. Plaintiff extracts two phrases from the court's opinion at folio 510. "This court may not apportion the plaintiff's fault", and another at folio 511, "He was guilty, to some degree, of contributory negligence", as the basis for this unwarranted contention. Plaintiff, however, overlooks the fact that at folio 495, the court found that there was no evidence to warrant a finding of negligence on

behalf of either defendant. The court also pointed out at folio 499 that the negligence in the case was that of plaintiff's foreman, Corio. Obviously, the court could not apportion plaintiff's fault where there was a specific finding that neither defendant was at fault. The fact that the court used the word "apportion" is a clear indication that it fully understood the rule of comparative negligence.

Plaintiff's reference to *Besner* v. *Central Trust Co.*, 230 N. Y. 357, on pages 10 and 11 of his brief is taken out of context. The facts in the *Besner* case are at complete variance with the facts in the case at bar. In the *Besner* case, the defendant owner interfered with the operations of the various contractors working for him and thereby created an unsafe condition. The Court, in the *Besner* case, stated at page 362:

> "According to the general rule, an owner is not liable when contracting for work to be done with an independent contractor for accidents that happen in the course of the work. (citing cases) To this general rule there is an exception where the work contracted to be done may become inherently dangerous by the acts of interferences of the owner. • • •
>
> "The work of Besner was made dangerous and the situation perilous, not from the nature of the work contracted, but from the work which the owner himself insisted upon doing at the time for his tenants."

The *Besner* case has no application to a situation where the injury is due to the negligent act of the employer of the injured person in the performance of a detail of the work.

Plaintiff's reference to the New York State Workmen's Compensation Law's classification of longshore work as hazardous, is entirely irrelevant. An examination of Section 3 of the Workmen's Compensation Act (64 McKinney's

Consol. Laws) reveals that its purpose was to encompass within its purview, all types of employments. What plaintiff overlooks is that the Workmen's Compensation Act was passed to regulate the status of employer-employee and was in no way connected with the regulation of relationships between injured persons and third parties. Matter of *Zirpola* v. *Casselman, Inc.*, 237 N. Y. 367, 373.

CONCLUSION.

THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT. ITS FINDINGS THAT THE DEFENDANTS WERE NOT NEGLIGENT AND THAT THE SHIP'S EQUIPMENT WAS REASONABLY SAFE WERE AMPLY SUPPORTED BY THE EVIDENCE. THE PLAINTIFF HAS FAILED TO PROVE THAT THE VESSEL OR ANY OF THE APPLIANCES WERE UNSEAWORTHY. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

VERNON SIMS JONES,
Attorney for Respondent, Isbrandtsen Co., Inc.

JAMES B. MAGNOR,
Of Counsel.

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MAR 2 2 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 596/Misc.

HAYES SALMOND,
Petitioner,

against

ISBRANDTSEN CO., INC. and BETHLEHEM STEEL CO.,
Respondents.

BRIEF FOR RESPONDENT BETHLEHEM STEEL CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK A. BULL,
Counsel for Respondent
Bethlehem Steel Company.

Bowne & Co., Inc., 163 Front Street, New York 38

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BRIEF FOR RESPONDENT BETHLEHEM STEEL CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a petition (by plaintiff below) for a writ of certiorari to review a judgment for respondents of the New York Supreme Court, Kings County, after a trial in that court, a unanimous affirmance by the Appellate Division, Second Department, and the denial of further appeal by the New York Court of Appeals. The action originally was against Isbrandtsen Company, Inc. (hereinafter called Isbrandtsen), but respondent Bethlehem Steel Company (hereinafter called Bethlehem) was brought in, only six weeks before the trial, by summons dated March 24, 1953, and an amended complaint (pp. 6-10).*

Undisputed Facts.

The facts of this case are relatively simple, and we will endeavor to state briefly those which appear not in dis-

*References are to pages and folios of the Record in the Appellate Division, which we understand was filed in this court by petitioner.

pute. Respondent Isbrandtsen owned the steamship *Flying Cloud* and sent it to respondent Bethlehem's shipyard in Brooklyn for repairs and the removal of set concrete ballast in No. 3 lower hold. Bethlehem engaged American Stevedores, Inc. to break up and remove the concrete from the ship. Petitioner was a longshoreman employed by American Stevedores Inc. and, at the time of his accident, was working ashore on the pier guiding drafts of the removed concrete onto a truck to be hauled away.

Under the sub-contract of American Stevedores, Inc. it agreed to "perform all the work (including the furnishing of all materials, tools, equipment, labor and superintendence required therefor)" (fol. 504). The stevedores used the ship's winches and gear, but their own cable sling (fols. 341-3), to haul the pieces of concrete during their removal. Bethlehem supplied electricity to the ship for its needs, and by which the winches were operated.

On April 19, 1951, petitioner was first assigned by his employer to work in No. 3 lower hold breaking up concrete, but some time between 10:00 and 11:00 that morning (fol. 284) one of his employer's foremen (fols. 344-5) assigned him to work on the truck which was on the pier to haul the concrete away (fols. 283, 337). About 5:30 that afternoon a block of concrete, while being taken by the longshoremen from No. 3 lower hold to the truck, broke in two pieces and one piece fell on the petitioner who was on the truck.

The Evidence.

The petitioner testified that he was working for American Stevedores, Inc. (fol. 75) while the ship was at Bethlehem's 56th Street Yard (fol. 79); that he started work in No 3 lower hold breaking concrete (fols. 83-5), and sometime between 10:00 and 11:00 o'clock that morning he was transferred to work on a truck on the pier on which the

pieces of concrete were placed for removal from the yard (fols. 86, 87).

There were two men assigned to put the pieces of concrete in position on the truck (fols. 91-2), and there was a signalman on the ship to let them know when a piece of concrete was coming over to the truck (fols. 123-4). All three men, including the petitioner, were employees of the stevedoring company. At around 5:00 to 5:30 that afternoon a piece of concrete came over which stopped all of a sudden over the truck (fol. 99). He does not remember anything after that (fol. 99), but other witnesses testified that he was struck by a piece of the concrete that fell.

At the time, the petitioner was standing on the end of the truck (fols. 109, 113), but he said the other man assigned to that work was on the cab of the truck (fol. 113). He testified that nobody told him to stand anywhere else than on the truck itself as these heavy pieces of concrete were being loaded onto it (fol. 116), but other witnesses do not agree with that.

The other man who was working with the petitioner at the time, Alonzo Lane, was called as a witness by the petitioner (fol. 404) and testified that he was taken from the hold of the ship and assigned to the truck "to help Salmond land the draft on the truck" (fol. 406). At the time this particular draft came over he was on a shanty alongside the truck and the petitioner was standing on the back of the truck (fol. 407). The witness had climbed directly from the truck to the shanty (fol. 409).

Charles Anderson, a hatch boss employed by American Stevedores, Inc., on the *Flying Cloud*, was also called as a witness for the petitioner (fols. 277-8). He testified that he was a sort of snapper and a sub-boss (fols. 344-5). Tony Corio was the superintendent for American Stevedores, Inc., and Anderson's superior (fols. 289, 341, 344). Anything Corio said went in that operation (fol. 344).

Anderson's job was to place the men, tell them what to

do and show them how to do it (fol. 278). He assigned American Stevedores, Inc.'s winchmen to their jobs (fol. 340), and he assigned the petitioner to work on the truck (fols. 282-3, 337). Corio assigned the other man (Alonzo Lane) on the truck to work with the petitioner (fols. 288-9). When Anderson assigned petitioner to work at the truck, he told him how to do that work and where to stand, that is, on the cab of the truck or on the shed alongside it (fols. 338-9). This structure is sometimes called a shed, a shanty or a cabin, but it is the same place referred to by different witnesses. One could step directly from the truck to the shed (fols. 339, 409).

There were two of the ship's winches used in the work of American Stevedores, Inc. (fol. 300), and four of American's men were assigned to operate these two winches (fol. 299). Anderson testified to some difficulty with winches on the preceding day but could not testify to any fault of the winches on the day of the accident. He said that on that morning the winches ran "very smooth" (fol. 319), and that afternoon he noticed some jerking of the drafts but didn't know from what (fol. 319). He was not operating the winches or in any position to pass upon their operation (fols. 320-2). He testified that the sling used to secure the blocks of concrete belonged to American Stevedores, Inc. (fol. 343) and that that company always used a single sling in this kind of work (fol. 301).

Petitioner also called as a witness Stanley Small who was hired by American Stevedores, Inc., as a winch operator (fols. 351-2, 378). He testified that the winches seemed to him to be operating normally (fol. 366). At the time of the petitioner's accident, however, he was acting as a gangway signalman (fol. 353), and as such it was his job to warn the men on the truck "to stand clear" when a piece of concrete was coming out of the hold to be put on the truck, and he did so (fol. 357). At the time the particular piece of concrete involved was swung out of the

ship, Lane was on the shed alongside the truck and the petitioner was on the truck cab (fols. 357-8). He saw petitioner scramble over the truck to get to the shed where Lane was, and he signaled the winch to stop, but the draft was over the truck and a piece of it fell off and struck the petitioner (fols. 358-9), who was scrambling over the concrete then on the truck (fols. 359, 365).

The first electrician on the *Flying Cloud*, Francis Cajiaas (fols. 443-4), testified that there was no trouble on the ship with the electric current furnished (fols. 451, 453).

The boatswain on the *Flying Cloud*, Kenneth Greenidge (fol. 459), testified that he and the first mate checked the four winches which could serve No. 3 hold, and their gear, and found everything in good condition after the petitioner's accident (fols. 461-3).

Joseph Tucci, the driver of the truck on which the concrete was being put, and who was not an employee of any of the parties to this action (fols. 478-9), testified that at the time of petitioner's accident he was on the ship's deck (fol. 480). He said that the men working on the truck would often be on the cab of the truck when a load would come out from the ship, but would usually run back and get on the shed (fols. 483-4).

Hosea De Costa was called by the defendant Isbrandtsen and testified that he was one of the American Stevedores, Inc. employees working in No. 3 lower hold of the *Flying Cloud* on the day of the petitioner's accident (fols. 421-4). He saw the draft which was involved in the petitioner's accident (fol. 424). After putting the cable on the block of concrete he saw that there was a crack in it and he called it to the attention of Charles Anderson, whom he referred to as the foreman. Then the boss, Tony (Tony Corio), asked what the trouble was and the witness told him there was a crack in the concrete block and it should not be taken up by the sling. The boss then told him "let

them run the job," and the longshoremen took the block up and the accident happened (fols. 424-5). This witness testified that there was no one on behalf of the stevedores who inspected the blocks of concrete before they were taken out of the hold (fol. 432). His testimony was never questioned and the superintendent, Tony Corio, was never called to testify.

Two of Bethlehem Steel Company's employees were examined by the petitioner's counsel before trial but neither of them saw the accident. One was Fred Eisenhauer, Bethlehem temporary light electrician (fols. 215-17), who gave no testimony material to the case. However, on his examination petitioner offered in evidence (fols. [illegible]) the sub-contract between Bethlehem and American Stevedores, Inc., which was accepted in evidence as Plaintiff's Exhibit 2 (fol. 263). Pertinent parts of this agreement are quoted in the decision of the trial judge (fols. 563-5). By that contract American Stevedores, Inc., petitioner's employer, agreed to drill, break, remove and dispose of the cement ballast in No. 3 hold and to perform all the work, including superintendence, and be solely responsible for the safety of the work and all equipment and material used therein.

The other witness was David Bunger, a safety engineer, who testified that he "didn't particularly like the way they were taking the ballast blocks out of the ship"; and that he told the stevedoring foreman that he thought he should use something besides the wire sling. He said "they loaded the blocks in a truck * * * and just pulled the sling right out of the load, which lets the load bounce around in the truck." His concern was with the pulling of the sling from under the heavy blocks after they were landed in the truck, as that would necessarily cause the blocks to bounce or roll along part of the wire sling and probably weaken it, or even break it. He said "if they weaken that way you could have a possible accident later on." However, the sling belonged to the stevedores and wearing of it was their concern (fols. 198-9). It did not break.

He said he told Bethlehem men to keep away from the operation and he had the gangway moved farther from it (fols. 200-1); but he had no authority to stop the work (fol. 209). This witness testified that he thought that the superintendent of the yard could have stopped the work if he thought it was endangering the ship or Bethlehem's employees (fols. 209-11), but that was a conclusion of law, contrary to the actual agreement between the stevedores and Bethlehem.

The Questions Presented.

The question presented is whether either defendant failed in any duty owed to petitioner, where the details of the work were under the control of his employer, i.e. whether they were liable for petitioner's injury caused by a piece of concrete breaking and falling on him while it was being moved by his co-workers. The cause of the accident was handling of a cracked piece of concrete (without the knowledge of respondents) which broke in two when it was over the shore truck on which petitioner was working.

There is also a question raised by petitioner as to the seaworthiness of the ship, but Bethlehem was not its owner and did not warrant its seaworthiness. In any event, no unseaworthiness was shown, as the accident was due to the concrete which petitioner's co-workers cracked and then sent ashore, and it was not due to any condition of the ship or its equipment.

The Decisions Below.

The trial court found that neither of the respondents was negligent and allowed a judgment in their favor. The decision is unreported, but appears at pages 164-71 of the record.

The Appellate Division, Second Department, on petitioner's appeal, unanimously affirmed the trial court. Its

memorandum opinion is reported in 286 App. Div. 1015, 144 N. Y. S. 2d 578.

The Court of Appeals denied petitioner's application for leave to appeal, without opinion.

Argument.

Bethlehem was not the owner or operator of the ship. It had a contract with the owner to make repairs on the ship and to remove concrete ballast. It let the ballast work to American Stevedores, Inc. (petitioner's employer) as a sub-contractor under a contract by which the stevedoring company agreed to

> "perform all the work (including the furnishing of all materials, tools, equipment, labor and superintendence required therefor)"

and to

> "be solely responsible for the safety of the work and of all equipment and materials to be used therein."

These agreements are in Plaintiff's Exhibit 2, and are quoted in the trial court's opinion (p. 168; fols. 503-5).

As said of such a contract in *Kelly* v. *City of New York*, 11 N. Y. 432, 435-6 (cited with approval in *Uppington* v. *City of New York*, 165 N. Y. 222, 234):

> "The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants; that he might make his own selection of workmen will not be denied. * * * As a general rule, certainly, no one can be held responsible as principal, who has not the right to choose the agent from whose act the injury flows. * * *
>
> "But the corporation, in addition to its want of power to protect itself, by the employment of suitable workmen, had no power to direct, in this case,

any more than in that of *Pack* v. *New York*, as to the particular manner of performing the work. The object of the clause relied upon, was not to give to the commissioner of repairs, and the other officer named, the right to interfere with the workmen, and direct them in detail *how* they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was to be done, nor *who* should do it."

It is well-settled law that an owner or a general contractor is not liable for injuries caused to a sub-contractor's employees by the sub-contractor's negligent performance of its work. We will refer to only a few of the cases, without going into the detailed facts.

In *Moore* v. *Wills, Inc.*, 250 N. Y. 426, the New York Court of Appeals said:

> "As a general rule a general contractor is not responsible for the negligent acts of his sub-contractor. * * *
>
> "The plaintiff has failed to bring the general contractor within any exception to the general rule. The fact that the general contractor retained some limited power of general supervision for the purpose of seeing that the work was being properly done by the sub-contractor, according to the plans and specifications, did not make it liable for the independent negligent act of the sub-contractor." (pp. 428-9)

In *Ahbol* v. *Harden Contracting Co.*, 265 N. Y. 564, that court held, where an employee of a sub-contractor was injured by a negligent act of another sub-contractor's employee, that the general contractor was not liable.

In *Herman* v. *City of Buffalo*, 214 N. Y. 316, 320, it was said:

> "The fact that the owner through an architect and superintendent of construction or other agent exercises a general supervision of the work and con-

> struction does not affect the rule of exemption from liability, where that is only for the purpose of assurance that the contract is being performed."

In *Iacono* v. *Frank & Frank Contracting Co.*, 259 N. Y. 377, 381, the court said:

> "We know of no duty resting upon an owner or a general contractor to inspect the machinery and tools furnished by a sub-contractor, which that contractor exclusively possesses and controls; nor of any duty, after an inspection disclosing defects, to make repair of a defective appliance."

In *Kahn* v. *City of New York*, 274 N. Y. 118, 134, it was said:

> "Assuming, without deciding, that the safe place doctrine of the common law has been imported into the general maritime law and that Forsyth stood in the position of a sub-contractor of Carlin, it will not aid plaintiff for, even under those conditions, there was no duty on the part of Carlin to make any inspection nor to make repairs of defective means in the exclusive possession and operation and under the control of Forsyth."

See also *Broderick* v. *Cauldwell-Wingate Co.*, 301 N. Y. 182, 197 and *Uppington* v. *City of New York*, 165 N. Y. 222, 233-5.

We believe such decisions dispose of petitioner's argument that Bethlehem is liable for failure to properly supervise the work of petitioner's employer. However, at pages 10-12 of petitioner's petition appears a quotation, taken out of context, from the opinion in *Besner* v. *Central Trust Co.*, 230 N. Y. 357, 362. This partial quotation is used in support of a contention that respondents would be liable if the work being performed was dangerous. The facts in that case were so different from those in the case at bar that the quotation is entirely inapplicable. There the acts of another than the plaintiff's employer, which were attribu-

table to the defendant owner, interfered with and created danger to the plaintiff. What the court stated the law to be is:

> "According to the general rule an owner is not liable when contracting for work to be done with an independent contractor for accidents that happen in the course of the work. (Citing case.) To this general rule there is an exception where the work contracted to be done may become inherently dangerous by the acts or interferences of the owner. * * *
>
> "The work of Besner was made dangerous and the situation perilous, not from the nature of the work contracted to be done, but from the work which the owner himself insisted upon doing at the same time for his tenants."

That case involved affirmative negligent acts of one of the owner's contractors, acting under the owner's instructions, causing a condition dangerous to an employee of another of the owner's contractors, which resulted in injury to the employee. It has no application to injuries of a contractor's employee due to his own employer's negligent acts.

Petitioner asserts that his work was inherently dangerous *because* longshoremen's work is classified as "hazardous employment" in the State Workmen's Compensation Law (Petition, p. 9), but the Compensation Law is irrelevant in the case at bar. It "regulates the relation, not between a workman and the world at large, but between workman and employer" *Matter of Zirpola v. Casselman, Inc.*, 237 N. Y. 367, 373. "It leaves unaffected the liabilities of third persons." *Employer's Mutual Life Insurance Co. v. Refined Syrups Sales Corporation*, 184 Misc. 941, 53 N. Y. Supp. 2d 835, 838.

Petitioner also argues that Bethlehem failed to furnish him with a safe place to work; but there is no evidence that either respondent furnished him an unsafe place, or supplied him with unsafe tools or appliances. The accident was caused by petitioner's fellow servants hoisting

out of the hold and over to the truck a large piece of concrete that was cracked. Part of that concrete slab fell and struck petitioner because of the crack,—not because of the place of work or the failure of any equipment or appliance to perform its function. Nothing broke, except the cracked concrete slab which petitioner's fellow servants negligently undertook (with knowledge) to remove by a sling.

Petitioner's employer was charged with the superintendence of the operation and its employees directed the details of the work. The sling, owned by his employer, did not fail. Petitioner argues that Bethlehem's employee, Bunger, thought some other means would be safer; but Bunger's concern was with the handling of the sling in pulling it from under the heavy concrete blocks as "there was danger of breaking wires" and "if they weaken that way you could have a possible accident later on" (fol. 199). What he thought could happen did not occur, as the wire sling did not break and there was no evidence that it weakened.

Petitioner argues that this case is not governed by New York law, but by the admiralty law, and cites for that position 46 U. S. C. A., § 740. That section extends the admiralty and maritime jurisdiction to cases of damage or injury *caused by a vessel on navigable water*, notwithstanding the injury is consummated on land. As pointed out by the Appellate Division, petitioner's injury was not "caused by a vessel," but by the breaking of a concrete block. It was due to the negligence of his fellow workers in knowingly handling a large concrete slab with a wire sling when the slab was cracked. Clearly the statute does not apply to such a case.

A case very much in point, and which would seem to dispose of plaintiff's arguments, was decided by the Court of Appeals for the Second Circuit, *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397. It involved a

longshoreman, in the employ of an independent contractor, who was injured *on a ship* and sued the shipowner. The court applied the maritime law.

There the plaintiff was engaged in the loading of a ship and his employer, the contracting stevedore, stationed him on the cover of a partly open hatch to direct winchmen. While in that position a cable from the winch dislodged a hatch beam and plaintiff was precipitated into the hold below. As in the case at bar, he claimed negligent failure to supply safe equipment and adequate inspection, and failure to provide adequate supervision of the loading operation. In holding that the shipowner was not liable to the plaintiff for the negligence of its contractor, the plaintiff's employer, the court said:

> "American (the stevedore) relies heavily on the fact that two of Cyprien's (the shipowner) men were present at the hatch supervising distribution of the cargo and guarding against pilferage. But there is no evidence that they were in any other way concerned with the manner in which American performed its work. As we said in *Gallagher* v. *United States Lines Co.*, 2 Cir., 206 F. 2d 177, 179, certiorari denied 346 U. S. 897, 'a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work.' American has continually asserted that there was an issue as to control of the operation, but we see virtually no evidence to support its contention. And had there been, the question would properly have been one for the jury. We are clear that since control of the details of the operation was left to American, Cyprien cannot be held for negligence in the latter's performance." (pp. 399-400)
>
> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." (p. 400)

Any issue as to control in the instant case was decided by the trier of the facts. Petitioner was stationed at his place of work by American, his employer; and American was in charge and conducted the operation, and assumed control of the place of work. It was expressly agreed that the contracting stevedores would perform and superintend the work. There was no obligation of Bethlehem to supervise the method or details of performance, either under the contract with petitioner's employer or by operation of any law, state or maritime. Bethlehem was not required to insure that his employer would not negligently injure him.

Petitioner argues that the court should have, but did not, apply maritime law. The Appellate Division said that the case "is not covered by maritime law" as the accident "was caused by the breaking of a concrete block" over the truck on the pier. It stated, however, that even if it were covered by maritime law there was no proof of unseaworthiness or of defective equipment or appliances. It pointed out that petitioner's employer was in control of the details of the work and petitioner's accident resulted from "the manner in which the work was done under his employer's supervision." It is apparent that on the facts of this case the same result necessarily follows either under New York or maritime law.

Petitioner also tried to raise a legal question from a different effect of contributory negligence under the state and the maritime law, but this case was decided on a finding that there was no negligence or breach of duty on the part of the respondents.

The question of seaworthiness does not concern Bethlehem and we will not offer any extended discussion on that issue raised by the petitioner with the shipowner. However, in fairness, we must state that there is not a scintilla of evidence in the record of any unseaworthiness contributing to petitioner's accident. *Freitas* v. *Pacific-Atlantic Steamship Co.* (1955), 218 F. 2d 562. Every part of the ship and its equipment (and even the sling owned and used

by the stevedores) properly performed its function. The sole causes of the accident were the longshoremen's negligent handling of a cracked slab or block of concrete, and petitioner being elsewhere than where he was instructed to be at the time.

We know of no case which extends the warranty of seaworthiness to the condition of the article being removed from a ship by longshoremen.

Petitioner attempts to make a point of the fact that the trial court found (fols. 510-11) that plaintiff was "guilty, to some degree, of contributory negligence," but said he "may not apportion the plaintiff's fault." His first finding was that neither respondent was negligent, and that any negligence "was the negligence of American Stevedores' foreman" (fol. 499). He said that the evidence would not "warrant a finding that either" of the respondents was at fault (fol. 495). With a finding of no negligence of either defendant, the question of contributory negligence of plaintiff became academic. However, the trial court found that petitioner was negligent. Being an unnecessary and immaterial finding it cannot have any effect on the result; and that is so whether contributory negligence would be a complete defense or a partial defense.

CONCLUSION.

The facts having been found from credible evidence, by the legally authorized trier of the facts, and the legal issues having been decided by the trial court and a unanimous Appellate Division in conformity with the law, both state and maritime, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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